Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MORRIS B. MYERS,

Petitioner,

vs.

UNITES STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 10th Circuit Court's determination that petitioner's appeal was frivolous was correct as a matter of law and in accordance with proper standards, where the record on appeal showed without dispute federal constitutional violations based upon the U.S. 8th Circuit Court of Appeals affirming a district court's order directing a verdict agianst petitioner in petitioner's professional negligence action against his defense attorneys in a state embezzlement prosecution in which petitioner was convicted and the state's evidence showed petitioner borrowed the money allegedly embezzled from a bank, state law at the time was that borrowed money is the borrower's own money, and

petitioner's defense attorneys did not raise the loan defense at any stage of the criminal proceedings.

2. Whether the 10th Circuit Court's determination that petitioner's action in the district court was frivolous was correct as a matter of law and in accordance with proper standards where the record on appeal showed without dispute federal constitutional violations based upon the 8th Circuit Court dismissing as frivolous petitioner's appeal from a district court's judgment dismissing petitioner's Sec. 1983 claim for declaratory and injunctive relief against the state court judges in their official capacities who were responsible for the state court decision on the appeal from the judgment of conviction in the embezzlement prosecution which state

court appellate decision characterized the cash claimed by the state to have been embezzled as cash "borrowed from the bank" but affirmed the conviction anyway.

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APPEALS FOR THE TENTH CIRCUIT

Petitioner Morris B. Myers respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of

Appeals for the Tenth Circuit, which held as frivolous petitioner's action in the district court and affirmed the district court's order denying petitioner's motion to vacate the district court's order dismissing petitioner's complaint and denying petitioner's motion to amend the complaint to add a claim against respondent.

OPINION BELOW

The Tenth Circuit's panel decision which determined petitioner's action in the district court to be frivolous and which affirmed the decision of the district court denying petitioner's motion to vacate the district court's order dismissing petitioner's district court action, and denying petitioner's motion to amend the complaint to add a claim against respondent, is unreported;

the decision is reprinted as Appendix A.

STATEMENT OF JURISDICTION

The panel decision of the United States Court of Appeals for the Tenth Circuit is dated April 5, 1994. A petition for rehearing with a suggestion for rehearing en banc was denied on May 31, 1994. The jurisdiction of this Court to review the judgment by writ of certiorari is invoked purusant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall. . .be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On January 8, 1970, the Farmers & Merchants Bank of Aberdeen, South Dakota,

loaned petitioner $4035.60 for which petitioner gave his unsecured promissory note due in thirty days. The proceeds of the loan and note were credited to petitioner's personal checking account the following day and were thereafter drawn out and spent by petitioner.

On September 11, 1972, an indictment was returned in Brown County, South Dakota, against petitioner charging him with embezzling the very cash he borrowed from the bank on January 8, 1970.

[Trial testimony:

Q. [Prosecutor] I show you what has been marked for identificatiojn as Exhibit 2, and ask you if you can identify that?

A. [Farmers & Merchants Bank officer Christensen] That is a

promissory note signed by Morris Myers on January 8, 1970.

Q. The face amount of that note is $4035.60, is that correct?

A. Yes it is.

Q. Did you make out the note at that time in that amount?

A. Yes, I did.

Q. What, if you know, was done with the proceeds of that note?

A. The proceeds of the note were deposited to Mr. Myers' account.

Q. Now I notice you stated that Morris Myers was in your office on January 8; the deposit is shown in the ledger as January 9. Can you explain that?

A. It was late in the afternoon on January 8, and all banks have cut-off-

time, and it is possible that the transaction was completed after the cut-off-time on January 8, so when it was deposited it was recorded as January 9, in the bank statement.]

Petitioner engaged the services of South Dakota attorneys Joe Butler and Ellsworth Evans to defend him against the embezzlement charge. They failed to assert the loan defense in petitioner's behalf even though at the time in South Dakota borrowed money is the borrower's own money. Petitioner was convicted and was sentenced to two years confinement in the South Dakota penitentiary.

The judgment was affirmed on appeal [220 N.W. 535 (S.D. 1974)]. In its decision the appellate court characterized the allegedly embezzled

money as cash "borrowed from the bank."

Petitioner sued attorneys Butler and Evans for malpractice in the U.S. District Court, District of South Dakota, Western Division [Civ. No. 75-5076]. In an amended complaint petitioner alleged ". . .at the close of the state's case-in-chief. . .defendants [Butler and Evans] failed to move the court for a directed verdict on the grounds that the money claimed to have been embezzled by plaintiff [petitioner] was in fact and law loaned or advanced to plaintiff by the Farmers & Merchants Bank of Aberdeen, South Daktoa, and belonged to plaintiff. . ." which allegation was established at trial by the introduction of competent evidence.

The district court directed a

verdict against petitioner and on appeal the 8th Circuit Court of Appeals affirmed stating that "Appellant [petitioner] contends that appellees [Butler and Evans] were negligent in that they failed to properly present at the trial and appellate levels the defense that the money which appellant allegedly embezzled was, in fact, a loan to him and, accordingly, could not sustain a charge of embezzlement.

* * *

"Contrary to the appellant's contention that appellees never raised the loan issue, the Supreme Court of South Dakota was presented with the issue of the sufficiency of evidence to support a conviction of embezzlement. The court noted that it was for the jury to resolve

the factual disputes and that the jury had abviously rejected appellant's version."

In this action petitioner sued the 8th Circuit judges in their official capacities, directly under the Constitution alleging that the action of the court evidenced by its decision at 566 F.2d 398 deprives petitioner of a constitutionally protected property interest in violation of the Fifth Amendment. In the proceeding petitioner sought also to add a claim based upon the 8th Circuit Court of Appeals dismissing as frivolous petitioner's appeal from a district court's judgment dismissing petitoner's Sec. 1983 claim for declaratroy and injunctive relief against the state court judges responsible for

the state court decision in the appeal from the judgment of conviction in the embezzlement prosecution which state court appellate decision characterized the cash claimed by the state to have been embezzled as cash "borrowed from the bank" but affirmed the conviction anyway even though to constitute the crime of embezzlement there must be a wrongful appropriation of the cash in question - an element lacking in this case. Here it is alleged again that petitioner was deprived of a constitutionally protected property interest.

REASONS FOR GRANTING THE WRIT

The record in this matter which includes the entire trial record in the embezzlement prosecution and includes the

appellate briefs of both parties shows conclusively that the loan defense was not asserted at the trial nor was it in the appeal from the judgment of conviction. It further cannot be questioned that had the loan defense been asserted the embezzlement prosecution would have failed and petitioner has a cause of action against Butler and Evans for their negligence in failing to discover and assert the loan defense.

Petitioner also has a cause of action against the judges of the South Dakota Supreme Court under 42 U.S.C., Sec. 1983 where the appellate decision characterizes the money allegedly embezzled as cash "borrowed from the bank" and an affirmance of the judgment would necessarily be based upon a record

devoid of proof of the element of appropriation, a necessary element of the crime of embezzlement, and thus in violation of petitioner's right to due process of law under the Fourteenth Amendment. In re Winship, 397 U.S. 358 (1970).

The operation and effect of the decisions of the 8th Circuit Court of Appeals assailed herein, as well as the decision of the 10th Circuit Court of Appeals in these proceedings, is to extinguish that which by the law of the land is the property of petitioner, and so far as said decisions have that effect, they are unconstitutional and void. A cause of action is a species of property protected by the Due Process Clause of the United States Constitution.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 428 (1950). The limitations inherent in the requirements of due process and equal protection of the law extend to judicial, as well as political, branches of the government so that a judgment may not be rendered in violation of those constitutional limitations and guranties. 46 AmJur2d Judgments, Sec. 17, p. 324.

Petitioner has the right to vindicate his rights in court which is the heart of the constitutional right to due process of law. The actions of the 8th and 10th Circuit Courts of Appeal is the equivalent of denying petitioner an opportunity to be heard upon petitioner's claimed rights. Logan v. Zimmerman Brush

Co., 455 U.S., at 429-30, quoting Bodie v. Connecticut, 401 U.S. 371, 380 (1971).

The testimony quoted ante., pp. 4-6, reflects the content of the only evidence admissible under the indictment which in its essentials reads that petitioner, "on or about the 9th day of January, 1970, . . .while being an attorney, had under his control. . .for the use of another person, to-wit: cash in excess of $50.00, said property being entrusted to him by Jeannette Zick, and he did then and there fraudulently appropriate said property. . ." [A conviction based upon evidence of other crimes not alleged in the indictment is not permitted. Stirone v. United States, 361 U.S. 212 (1960); U.S. v. Herrilll, 877 F.2d 341 (5th Cir. 1989).]

It is the duty of a lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt; to consider viable theories, and develop evidence to support those theories. These are some of the requirements of reasonable performance under the Sixth Amendment. Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991). There is no reasonable professional judgment that would support the omission of Butler and Evans to assert the loan defense in light of the evidence and testimony mentioned ante., pp. 4-6. But for such omission [negligence], petitioner would have been acquitted of the underlying charge.

Borrowed money is the borrower's own money. Cottonwood County Bank v. Case, 125 N.W. 298, 303 (South Dakota, 1910). For cogent analysis see Johnson v. State, 158 Ind.App. 611, 304 N.E.2d 555 (1973), and Matter of Smith, 966 F.2d 1527 (7th Cir. 1992). And Rollin M. Perkins and Ronald N. Boyce, Criminal Law, 3rd ed., 1982, p. 361, where it is stated "[w]hile spending money is a typical method of conversion, if it is the money of another, spending money by the so-called 'borrower' is not conversion, because he is spending his own money. The borrower could not commit embezzlement because it is his property."

In re Winship, supra., requires proof beyond a reasonable doubt of every element of the offense charged in order

that due process requirements are met. The decision of the South Dakota Supreme Court [220 N.W.2d 535] describes the allegedly embezzled cash as cash "borrowed from the bank" the necessary implication of which is that proof of the element of appropriation is missing. Petitioner has a due process right to be free from criminal convictions for crimes the necessary elements of which are not established beyond a reasonable doubt. The South Dakota Supreme Court's decision violates petitioner's due process rights in that it affirms a conviction where proof of the necessary element of appropriation is lacking. Petitioner therefore, has a right of action under 42 U.S.C., Sec. 1983, against the judges of

the South Dakota court, in their official capacities, for declaratory and injunctive relief that was extinguished by the 10th Circuit Court of Appeals. Pulliam v. Allen, 466 U.S. 522 (1984); Shelley v. Kraemer, 334 U.S. 1 (1948); Butz v. Economou, 438 U.S. 478, 489 (1978).

CONCLUSION

For the reasons stated, petitioner respectfully petitions this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Dated June 24, 1994.

MORRIS B. MYERS, Petitioner Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-4170
(D.C. No. 91-CV-1149)
(District of Utah)

MORRIS B. MYERS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS; DONALD P. LAY; THEODORE MCMILLIAN; RICHARD SHEPPARD ARNOLD; JOHN R. GIBSON; GEORGE G. FAGG; PASCO M. BOWMAN, II; ROGER L. WOLLMAN; FRANK J. MAGILL; C. ARLEN BEAM; JAMES B. LOKEN; FLOYD R. GIBSON; GERALD W. HEANEY; MYRON H. BRIGHT; DONALD R. ROSS; and J. SMITH HENLEY, judges of said court, in their official capacities,

Defendants-Appellees.

ORDER AND JUDGMENT

Before SEYMOUR, Chief Judge, McKAY and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument

would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff, appearing pro se, appeals two orders entered by the United States District Court for the District of Utah. First, Plaintiff appeals from the district court's Memorandum Order and Opinion entered on August 6, 1993, which denied his Motion to Vacate Order and

*

This order and judgment is not binding precedent, except that under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 19, 1993. 151 F.R.D. 470

not err in denying Plaintiff's Motion for Summary Judgment, dismissing his cause of action, and denying his Motion to Vacate Order and Motion to Amend Complaint.

The judgment of the district court is AFFIRMED.

Entered for the Court

s/Monroe G. McKay
Circuit Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-4170

MORRIS B. MYERS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS; DONALD P. LAY; THEODORE MCMILLIAN; RICHARD SHEPPARD ARNOLD; JOHN R. GIBSON; GEORGE G. FAGG; PASCO M. BOWMAN, II; ROGER L. WOLLMAN; FRANK J. MAGILL; C. ARLEN BEAM; JAMES B. LOKEN; FLOYD R. GIBSON; GERALD W. HEANEY; MYRON H. BRIGHT; DONALD R. ROSS; and J. SMITH HENLEY, judges of said court, in their official capacities,

Defendants-Appellees.

ORDER
Entered May 31, 1994
Before SEYMOUR, Chief Judge, McKAY and BALDOCK, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing in banc.

Upon consideration whereof, the

petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court.

ROBERT L. HOECKER, Clerk
By: s/L. Balzano
Deputy Clerk